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T.R.A. DOCKET ROOM

December 16, 2004

Jean Stone, Hearing Officer
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: In Re: Petition of King's Chapel Capacity
Docket No. 04-00335

Dear Hearing Officer Stone.


Attached is the Reply of Tennessee Wastewater Systems, Inc. to the Response of King's Chapel Capacity regarding whether these proceedings should be delayed pending the outcome of a lawsuit between the parties.

TWS has previously filed a motion for permission to file this Reply, pursuant to TRA Rule 1220-1-2-.06(3).

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:


Henry Walker

HW/djc

Cc: Richard Millitano
Charles Welch

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE: Petition of King's Chapel Capacity,)
LLC for Certificate of Convenience and)
Necessity to Serve an Area in Williamson,)
County, Tennessee Known as Ashby Community)

Docket No. 04-00335

REPLY OF TENNESSEE WASTEWATER SYSTEMS

Tennessee Wastewater Systems, Inc. ("TWS") submits the following Reply to the Response of King's Chapel Capacity, LLC ("King's Chapel") to the Motion of TWS to hold these proceedings in abeyance pending the outcome of a lawsuit between the parties now pending in the Williamson County Chancery Court.

ARGUMENT

As previously described by TWS, this application arises from a contractual dispute between TWS, a regulated wastewater utility, and the developers of a new subdivision in Williamson County. TWS, through an affiliate, has substantially completed construction of a new wastewater system to provide service in "Meadowbrook Subdivision" (referred to as "Ashby Communities" in the application of King's Chapel). Although the developers have paid approximately \$250,000 for the construction of the system, they still owe approximately \$300,000 more and will owe additional amounts as lots in the subdivision are sold. Rather than pay the remaining amounts, the developers have resorted to a variety of tactics, attacking TWS before various state and local agencies and even now claiming to "own" the TWS system and

asking the TRA to grant them a certificate to operate it.¹ TWS has responded, as appropriate, to these allegations and, in an effort to bring this dispute to an end, has filed suit in Williamson County Chancery Court seeking to enforce the contract, collect what the developers owe and asking, among other things, for the Court to declare that TWS, not the developers, owns the newly built system.

It is well established that public utilities “have the right of protection from competition from an enterprise offering the same service in the same service area.” Charles Phillips, The Regulation of Public Utilities, Theory and Practice, (1984) at p. 107. See Breeden v. Southern Bell Telephone Company, 285 S.W.2d 346, 349-350 (Tenn. 1955). These principles are incorporated in T. C. A. §65-4-201 through 203. Those statutes require that companies obtain a certificate from the TRA before constructing a utility system (Section 201), prohibit a utility from building a new system which will interfere with, or injuriously affect, an existing system (Section 202), and prohibit competition except where the TRA finds that the incumbent carrier is unwilling or unable to provide service “as may be reasonably required” (Section 203).

Initially, the owners of King’s Chapel appeared unaware of these legal requirements. The application filed October 5, 2004, makes no mention of the fact that “Ashby Communities” is within the service area of TWS, nor does the application allege that TWS is unwilling or unable to provide service. Moreover, the application admits, with no apparent understanding of

¹ The applicant in this proceeding, King’s Chapel, is owned by Charles Pinson, John and Elaine Powell, the three developers of the new subdivision. In the application, King’s Chapel states that the TWS system was “constructed” by Ashby Communities, LLC (presumably an entity created by the developers) and that the system was then “transferred” to King’s Chapel “to operate.” Petition, paragraph 2. If, as the Petition claims, the system was constructed by an entity which does not have a certificate from the TRA, the developers have violated T. C. A. §65-4-201 (“[No] person or corporation not at the time a public utility shall commence the construction of any plant, line system or route to be operated as a public utility . . . without having first obtained a certificate”) The knowing violation of that statute is a criminal offense, punishable by a fine of \$500 to \$1,000 for “each and every such act of violation” T. C. A. §65-3-119. See also T. C. A. §65-4-116. If the developers had, in fact, constructed the system (which they did not) they could be subject to a fine of \$1,000 for each day since the commencement of construction.

the possible consequences, that the developers of the subdivision have constructed a wastewater utility system without authorization from the TRA. If true, that is illegal under state law. See footnote 1, *supra*.

In response, TWS filed a petition to intervene in the application proceeding, noting that “Ashby Communities” was within the service area of TWS and that TWS had already built, pursuant to an agreement with the developers, a new system to provide wastewater services to the subdivision. TWS attached to the petition both a copy of its certificate to serve that area and a copy of the contract between TWS and the developers.

King’s Chapel strongly opposed the petition to intervene but, in twenty pages of argument, never mentioned the statutory restrictions which prohibit construction of a utility system without a certificate from the TRA and which restrict competition between utilities. Instead, King’s Chapel claimed that TWS “has no property rights to KCC’s wastewater property and/or plant” (p. 11) and that TWS’s claim to have a prior right to serve the new subdivision “constitutes an unlawful conspiracy by TWS under the authority granted by TRA” (p. 13). Furthermore, King’s Chapel seemed to believe that the principal basis of TWS’s claim to be the preferred provider to this subdivision is the contract between TWS and the developers. Based on that belief, King’s Chapel argued repeatedly that TWS was seeking to have the TRA “recognize and enforce” an illegal contract (pp. 6, 10, 18) and that the TRA has no jurisdiction “to adjudicate issues between TWS and Powell LLC relative to the contract entered into between them” (p. 17). King’s Chapel suggested that TWS should seek redress “before a court of law.” Id.

King’s Chapel was correct in one respect. This dispute between TWS and the developers is, at bottom, a contractual dispute that has nothing directly to do with the provision of utility service. Only a court can determine what the developers owe for the construction of the system

and who has legal title to the system's assets. The TRA has no statutory authority to address such issues. Therefore, TWS has filed a Motion asking the TRA to hold this matter in abeyance pending the outcome of the lawsuit between TWS and the owners of King's Chapel. As TWS noted in the Motion, the TRA cannot determine whether the existing facilities of TWS are adequate to provide the requested service until a court determines, among other things, who owns the existing system and whether the developers, "by submission of the Application [of King's Chapel] to the TRA" are engaged in a civil conspiracy "to convert and obtain" the property of TWS. Motion, p. 4.

In response to the Motion, King's Chapel finally acknowledges, for the first time, the existence of state statutes which restrict competition among wastewater utilities. King's Chapel, however, continues to insist that it "owns" the newly built facilities and that any issues relating to "breach of contract" between the developers and TWS are before a court "and should have no bearing on these proceedings." Response, at 3, 5. Attached to the Response is a copy of an "Amended Motion to Dismiss" filed by King's Chapel in Williamson County Chancery Court. In the Motion to Dismiss, the Defendants take the argument further, contending that, while the Court should retain jurisdiction over the suit "to resolve issues of monies" that may be owed for "construction, inspection, maintenance and repair of the wastewater facility," the Court should dismiss any matters "relating to the transfer of ownership of wastewater property as such jurisdiction is exclusive to the Tennessee Regulatory Authority." Amended Motion at 1-2. The Defendants argue to the Court that, because the TRA has "general supervisory and regulatory power" over utilities, the agency therefore has both the power and the obligation to "decide a contested case involving the wastewater plant, ownership and operation thereof." Id., at 2. The Defendants even insist that the ownership issue must be addressed first by the TRA before a court may consider the matter. Id., at 3-4.

In other words, the attorneys for King's Chapel have now come full circle: from initially arguing that the contract dispute between TWS and the developers belongs in court and is beyond the TRA's jurisdiction to now contending that the TRA, and only the TRA, has the power to decide who owns the assets of the new system.

In response to the Amended Motion, TWS has filed a memorandum of law with the Chancery Court (copy attached), discussing several Tennessee appellate decisions which address the jurisdiction of the TRA. Those decisions are clear: the TRA "must conform its actions to its enabling legislation . . . It has no authority or power except that found in the statutes." Response of TWS at 5-7. There is, of course, no statute, and King's Chapel has pointed to none, which directly or by implication gives the TRA power to resolve a contractual dispute between a utility and a developer, much less to determine which entity owns the assets of the system.

The Amended Motion to the Court at least recognizes that the issue of ownership is disputed but contends that only the TRA has original jurisdiction to resolve that dispute. King's Chapel has not tried to make that argument directly to the agency. That perhaps is not surprising since it is doubtful that King's Chapel can point to any decision in the history of the Authority, or its predecessor the Public Service Commission, in which the agency has purported to resolve a contractual dispute between a utility and a developer or to determine who owns utility property. To the contrary, as TWS has pointed out to the Chancery Court, a long line of court decisions hold that the agency only may exercise such powers as have been expressly granted by statute or arise by necessary implication from an express statutory grant. There is no statutory grant of power, express or implied, to the TRA to address all the underlying issues which must be resolved before this application can go forward.

For these reasons, the Motion of TWS to defer these proceedings pending the outcome of the Chancery Court lawsuit should be granted.

In other words, the attorneys for King's Chapel have now come full circle: from initially arguing that the contract dispute between TWS and the developers belongs in court and is beyond the TRA's jurisdiction to now contending that the TRA, and only the TRA, has the power to decide who owns the assets of the new system.

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For these reasons, the Motion of TWS to defer these proceedings pending the outcome of the Chancery Court lawsuit should be granted.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 

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(615) 252-2363

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. mail, postage prepaid, to:

Richard Militana
Militana & Militana
5845 Old Highway 96
Franklin, TN 37064

Charles B. Welch, Jr.
Farris, Mathews, Branan, Bobango, Hellen & Dunlap, PLC
Historic Castner-Knott Building
618 Church Street, Suite 300
Nashville, TN 37219

on this the _____ day of 16th, 2004.


Henry M. Walker

**IN THE CHANCERY COURT FOR WILLIAMSON COUNTY
AT FRANKLIN**

**TENNESSEE WASTEWATER SYSTEMS,
INC. f/k/a ON-SITE SYSTEMS, INC. and
ON-SITE CAPACITY DEVELOPMENT
COMPANY,**

Plaintiffs,

V.

**J. POWELL DEVELOPMENT, LLC, JOHN
POWELL, ELAINE POWELL, C. WRIGHT
PINSON, ASHBY COMMUNITIES, LLC,
HANG ROCK, LLC, ARRINGTON
MEADOWS, LLC, and KINGS CHAPEL
CAPACITY, LLC**

Defendants.

Case No. 31074

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION AND AMENDED MOTION
TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT OF RESPONSE**

Come now the Plaintiffs, Tennessee Wastewater Systems, Inc., formerly known as On-Site Systems, Inc., and On-Site Capacity Development Company, (hereinafter collectively "Plaintiffs" or individually "TWS" and "On-Site Capacity"), by and through the undersigned counsel, and file this response to the Defendants' Motion and Amended Motion to Dismiss, which incorporates its Memorandum of Law.

INTRODUCTION

This proceeding arises out of a legal dispute between the Plaintiffs and the developers of a new, residential subdivision in Williamson County. In essence, the developers contracted with

TWS to install a sewer system, and although the system is now substantially complete, the developers refuse to pay for it. As a result, TWS has been forced to sue the developers to enforce the contract

As a strategy to obtain sewer service without paying TWS, the developers have formed their own sewer company, "King's Chapel Capacity, LLC," and have filed a petition with the Tennessee Regulatory Authority ("TRA") seeking a certificate of convenience and necessity to provide sewer service to the subdivision ("the Application"). The Application contains no reference to TWS, much less an acknowledgment that TWS already holds a certificate to provide sewer service to that subdivision. Moreover, the Application even claims that the newly built system, which was constructed by a TWS affiliate under the supervision and pursuant to the certificate of TWS, is now the property of King's Chapel. (Complaint ¶¶ 10, 26-28, Exhibit 4).

TWS has caused a new system to be built to provide the requested sewer service. There is, or should be, no dispute that the new system is adequate to serve the subdivision and that TWS stands ready to begin providing service as soon as the developers fulfill their contractual obligations. Unfortunately, the developers have chosen instead to refuse to pay for the system they requested and, incredibly, now propose to seize and operate the system themselves through the TRA.

The Defendants have filed the original motion to dismiss purportedly based upon three "flaws" in the Verified Complaint: one, that the Plaintiffs are not a licensed contractors, and thus cannot bring an action for breach of a construction contract, despite using a licensed contractor to do the subject work; two, the individual defendants are not properly named because the Plaintiffs have not sufficiently pled to demonstrate a piercing of the corporate veil; and three, the Plaintiffs seek ownership of real property to which they do not have a valid legal claim. None of

these basis provide sufficient justification for a dismissal of this action because: one, the Plaintiffs used the services of a licensed contractor to build the subject wastewater disposal system, thus they satisfied the obligations of the Contractors Licensing Act of 1994, T.C.A. §§ 62-6-101, et seq.; two, there is no corporate veil to pierce because the individual defendants presented themselves to the Plaintiffs through an entity, J. Powell Development, LLC, which did not exist, and does not exist, thus making themselves individually liable for the acts of that purported entity; and three, the Plaintiffs assert ownership over the system, and an obligation of the Defendants to transfer ownership of the real property on which it sits, pursuant to Williamson County Regulations for Wastewater Treatment and Land Disposal Systems Section 1.11 (“Regulations”) (attached)

In their amended motion to dismiss, the Defendant add an allegation that this Court does not have jurisdiction over the issue of who owns the system, and thus cannot award declaratory or injunctive relief. This also does not provide adequate support to dismiss any of the Plaintiffs’ claims because the TRA can only exercise the specific powers given it by the Legislature, and a determination of the ownership of property is not included among those powers.

STATEMENT OF FACTS

Because the Defendants’ motion is brought pursuant to Tennessee Rule of Civil Procedure 12, the Court is required to assume that the facts, as pled in the Complaint, are true, and such a motion should only be granted upon a finding that the facts do not form a cause of action to which the plaintiff may be entitled to relief. Crews v. Buckman Labs. Int’l, Inc., 78 S.W.3d 852, 857 (Tenn. 2002); Pursell v. First American National Bank, 937 S.W.2d 838, 840 (Tenn. 1996). For the purposes on this response and memorandum, the Plaintiffs summarize the

allegations in the Complaint as they relate to the Defendants' motion.

TWS is a public utility, and On-Site Capacity is a company, with common ownership, whose purpose is to develop and finance opportunities for TWS. (Complaint ¶¶ 1-2). TWS and On-Site work with another related company, Pickney Brothers, Inc. ("Pickney Bros."), that is a licensed contractor. Pickney Bros.' purpose is to provide general contracting work for wastewater treatment systems that are developed by On-Site and operated by TWS. (Complaint ¶ 11). The Defendants were clearly aware of this relationship, and that Pickney Bros. was the construction arm of these three related businesses. (Complaint ¶ 22).

The corporate defendants, Ashby Communities, LLC, Hang Rock , LLC, Arrington Meadows, LLC and Kings Chapel Capacity, LLC ("Ashby," "Hang Rock," "Arrington" and "Kings Chapel") are all legal entities registered with the Secretary of State. (Complaint ¶¶ 7-10). J. Powell Development, LLC ("Powell Development") is not a legal entity, but was represented as one to TWS and On-Site by the individual defendants, Mr. Powell, Mrs. Powell and Dr. Pinson. (Complaint ¶¶ 3, 4-6, 14-15).

TWS and On-Site contracted with Powell Development, after discussions and negotiations with Mr. and Mrs. Powell, and Dr. Pinson, to construct and operate a wastewater treatment system for Meadowbrook Subdivision ("Meadowbrook"). The contract was attached to the Complaint ("the Contract"). (Complaint ¶¶ 14-16, Exhibit 1). Hang Rock and Arrington own the real property comprising Meadowbrook, and on which the system was to be built. (Complaint ¶ 15).

On-Site performed under the Contract, through Pickney Bros., as did TWS, which supervised, inspected and approved construction of the system. The system was complete on or about February 10, 2004. (Complaint ¶¶ 18-19, 21). The Plaintiffs were paid \$250,000 pursuant

to the Contract, which is the only payment that has been made thereunder. The Defendants have refused to pay the Plaintiffs the amounts that remain owing pursuant to the Contract. (Complaint ¶¶ 18, 20, Exhibit 3).

The Contract also obligates the parties to adhere to state and local regulations regarding the operation of utilities. The applicable regulations, Regulation 1.11, require that, once the system is complete, the system and land on which it sits be conveyed to the operator which, in this case, is TWS. (Complaint ¶ 25). The Defendants have failed to do so, which is the basis for the Plaintiffs' Declaratory Judgment Act claim, as well as their request for injunctive relief. (Complaint ¶ 39-43).

Finally, the Powells and Dr Pinson, individually, and through the defendant entities, have submitted an application with the TRA requesting a Certificate of Public Need and Convenience to operate a wastewater treatment and disposal system for a subdivision identified therein as the "Ashby Communities development" ("the Application"). The Ashby Communities development is, in fact, Meadowbrook, and the wastewater treatment and disposal system Kings Chapel seeks to operate is the system, for which On-Site has not been paid, and which, pursuant to the Contract, TWS owns and has a right to operate. The Application does not mention those details, which Application the Plaintiffs assert constitutes an inappropriate and illegal attempt to obtain the system, and avoid the Plaintiffs' rights. (Complaint ¶¶ 26-28).

ARGUMENT

A. The TRA's Jurisdiction Does Not Extend to Property Ownership Issues.

The statute that confers authority upon the TRA to regulate public utilities, and that defines its specific authority in relation to various matters, such as the regulation of rates and certificates of public convenience and necessity, are contained in Chapter 65 of the Tennessee

Code. The Defendants cite T.C.A. § 65-4-104 for the premise that the Legislature conferred upon the TRA broad, unlimited authority to supervise and regulate public utilities in relation to their property and property rights. That language, however, is modified with “so far as may be necessary for the purpose of carrying out the provisions of this chapter.” Given that language, and the context of the remainder of Chapter 65, Tennessee courts have very specifically limited the authority of the TRA, or its predecessor, the Public Service Commission (“PSC”), to that delineated by the Legislature, in the statute. In other words, although recognizing the TRA as having broad authority in relation to public utilities, the broad nature of that authority has been limited to those matters that are detailed or set aside for the TRA in the statute.

For instance, in South Central Bell Telephone Co. v. Tenn. Public Service Comm’n, 675 S.W.2d 718 (Tenn. Ct. App. 1984), the Tennessee Court of Appeals held that the Legislature did not intend to extend retroactive rate-making power beyond that expressly stated in the statute because the express inclusion of one power implies the exclusion of all others. “Tennessee authorities support a strict construction of the statutory powers of a utilities board.” Id. at 719. This is despite the fact that rate-making, generally, is a power granted to the TRA, as is detailed in Part 5 of Chapter 65 of the Code. This same legal premise has been consistently followed by other courts, involving different types of utilities, for years. See i.e., Pharr v. Nashville, C. & St. L. Ry., 208 S.W.2d 1013 (Tenn. 1948) (finding that the Public Service Commission can exercise no authority that is outside or beyond the express provision of the statute); Tennessee Public Service Comm’n v. Southern Ry. Co., 554 S.W.2d 612, 613 (Tenn. 1977) (if the Legislature intended PSC to have authority to insure the safety of the public in crossing a railroad right-of-way, it would have done so explicitly because “[a]ny authority exercised by the Public Service Commissions must be as the result of an express grant of authority by statute or arise by

necessary implication from the expressed statutory grant of power”); Bellsouth Telecommunications, Inc. v. Greer, 972 S.W.2d 663 (Tenn. App. 1997) (“The Commission, like any other administrative agency, must conform its actions to its enabling legislation. . .It has no authority or power except that found in the statutes.”) Id. at 680.

The Legislature has not expressly conferred upon the TRA the authority to determine property ownership by utilities. T.C.A. § 65-4-104 contains general language about the TRA’s authority over utilities in terms of property ownership, but that general language is modified by a limitation of that authority only as it may be necessary for the TRA to carry out its regulatory authority. The Defendants have raised no such legal or factual claim, nor could they in the context of a Rule 12 motion, unless they extract the claim from the Complaint itself. Although there is a matter pending before the TRA, in relation to the Kings Chapel application, the Plaintiffs do not contend that the King’s Chapel proceeding will or should be definitive regarding the issues pending in this litigation. The Plaintiffs simply include the factual allegation regarding that proceeding to provide a cause of action against Kings Chapel, and to further support their claims that the Defendants are engaging in a conspiracy to wrongfully convert the wastewater system that they had built, and for which they have a contract entitling them to payment. (Complaint ¶¶ 26-28)

The Defendants have failed to adequately support their position that this Court does not have jurisdiction in relation to the ownership of the subject system and real property on which it sits, and thus the Court should deny the Defendants’ request that the Court dismiss this part of their Complaint.

B. The Contractor Licensing Act Does Not Require TWS or On-Site to be a Licensed Contractor to Pursue a Breach of Contract Action.

The Defendants allege that, because neither TWS nor On-Site is a licensed contractor, that pursuant to T.C.A. §§ 62-6-101, et seq. (“the Contractor Act”), the Plaintiffs cannot pursue a breach of contract claim against them based upon the Contract. This reading of the statute is not, however, accurate, nor does it take into consideration the obligation of public utilities to be involved in the construction and operation of public utilities, including wastewater disposal systems.

The Contractor Act requires that anyone who engages in contracting be a licensed contractor. T.C.A. § 62-6-103. “Contracting” is defined, as the Defendants recite, as including bidding, supervising and overseeing construction. T.C.A. § 62-6-102. As the Complaint asserts, the Defendants were very aware that Pickney Bros. was the licensed contractor that would actually build the system, and that it would be performing On-Site’s obligations under the Contract, and that it did perform those obligations. (Complaint ¶¶ 13, 16, 18-19, 21-22, 24). That fact that Pickney Bros. was not actually a party to the Contract, or of the unfortunate wording identifying On-Site as the “contractor,” in the contract, does not change that fact.

The Tennessee statute related to the regulation of public utilities requires that no such public utility can establish, begin the construction of, or operate without having a certificate of public need and convenience. T.C.A. § 65-4-201. There is nothing in the public utility statutes or regulations that require the public utility itself to be a licensed contractor. Moreover, the fact of TWS’s involvement, including supervision, does not, in and of itself, require TWS to be a licensed contractor, especially since TWS is the public utility in this case, and the item being constructed was a utility system. (Complaint ¶¶ 1, 13).

The cases the Defendants cite to support their position are simply cases in which

unlicensed contractors attempted to recover for jobs they did, inconsistent with their statutory obligations to be licensed See, page 2 of Defendants' Motion. They are not applicable in this case because a licensed contractor did perform the subject work. If the Court is concerned about the use of the term "supervision" in the Complaint, the Plaintiffs request for the opportunity to amend the Complaint to omit that term, or more fully explain what was intended by the language in paragraph 19. Given the explanation of the relationship among the parties, however, the Defendants' motion in this regard is not supported by the law, and the Plaintiffs request that it be denied.

C. The Individual Defendants have Potential Liability Because of They Represented Themselves as Powell Development.

As set forth in the Complaint, Powell Development, though self-identified as a limited liability company, is not established as such through the Tennessee Secretary of State. (Complaint ¶ 3). Prior to the entry of the Contract, all three individual Defendants met with the Plaintiffs, and identified themselves as representatives of Powell Development. (Complaint ¶¶ 14-16). Mr. Powell signed the Contract on behalf of Powell Development. (Complaint, Exhibit 1). The Tennessee Limited Liability Company Act, at T.C.A. §§ 48-201-101, et seq., contains a detailed statutory scheme setting forth the formalities required of an LLC to be established in Tennessee. For instance, T.C.A. § 48-203-102(a) states that one or more individuals may form an LLC, by filing articles of organization with the Secretary of State. The statute further details what must be included in those articles, and that the effective date of the LLC is the date of filing, except in certain limited circumstances in which the date may be later. T.C.A. § 48-203-102(b). Just because the individual Defendants call Powell Development an LLC does not mean that it is such. Without having established it with the Secretary of State as an LLC, and

satisfying the requirements of the statute, it is not effectively an LLC. Thus, the individual Defendants are simply people “doing business as” an LLC, but not an LLC, and thus have individual liability for their actions. They are not entitled to rely on the LLC entity to shield them from personal liability because they never established it as a formal entity.

The Plaintiffs are not required to go through the process of piercing the corporate veil, because there is no corporate veil to pierce. There was not, nor had there previously been, a corporate entity pursuant to the LLC statute. Thus, the Powells and Dr. Pinson, were operating as individuals, apparently “doing business as” Powell Development, LLC. This makes them, in essence, partners, each of whom is jointly and severally liable for all obligations of the business. See generally, T.C.A. §§ 61-1-202 and 306.

- D. The Contract is Subject to Applicable Laws and Regulations, Which Require that the Utility Operator Own the Subject System and Land on Which it Sits.

The Defendants’ final basis for requesting the Court dismiss this action is based upon the allegation that the Contract requires that the utility, TWS, own the wastewater disposal system, and the land on which it sits. That claim, as is explained in the Complaint, is based upon the Contract’s requirement that the parties adhere to applicable state and local regulations regarding the operation of utilities (Complaint ¶ 26). The Regulations, at 1.11, specifically state “The wastewater treatment system, storage lagoons and land disposal site(s) and back-up disposal sites shall be owned and operated by the same entity.” As TWS is the utility designated to operate the subject system, the Regulations require that TWS also be the owner of the system itself, as well as the storage lagoons and land disposal sites. The Plaintiffs, through their Declaratory Judgment Act claim and request for injunctive relief, seek the Court’s recognition of TWS’ ownership of that system, and the entry of an injunction requiring that the real property on which

satisfying the requirements of the statute, it is not effectively an LLC. Thus, the individual Defendants are simply people “doing business as” an LLC, but not an LLC, and thus have individual liability for their actions. They are not entitled to rely on the LLC entity to shield them from personal liability because they never established it as a formal entity.

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- D. The Contract is Subject to Applicable Laws and Regulations, Which Require that the Utility Operator Own the Subject System and Land on Which it Sits.

The Defendants’ final basis for requesting the Court dismiss this action is based upon the allegation that the Contract requires that the utility, TWS, own the wastewater disposal system, and the land on which it sits. That claim, as is explained in the Complaint, is based upon the Contract’s requirement that the parties adhere to applicable state and local regulations regarding the operation of utilities. (Complaint ¶ 26). The Regulations, at 1.11, specifically state “The wastewater treatment system, storage lagoons and land disposal site(s) and back-up disposal sites shall be owned and operated by the same entity.” As TWS is the utility designated to operate the subject system, the Regulations require that TWS also be the owner of the system itself, as well as the storage lagoons and land disposal sites. The Plaintiffs, through their Declaratory Judgment Act claim and request for injunctive relief, seek the Court’s recognition of TWS’ ownership of that system, and the entry of an injunction requiring that the real property on which

the system sits be transferred to TWS to assure this common ownership.

The Defendants have not provided a basis for dismissal because of the Plaintiffs' allegations about the system and real property ownership, and thus request that the Court DENY the motion.

ROCHELLE McCULLOCH & AULDS

BY: _____

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BONE McALLESTER NORTON, PLLC

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Attorneys for Plaintiffs On-Site and TWS

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion to Continue was served via hand delivery, on December ____, 2004 to the following:

F. Shayne Brasfield, Esq.
BRASFIELD & MILAZO
109 Cleburne Street
Franklin, Tennessee 37064
